Appendix A—Certificate Denying Leave to Appeal to the New York Court of Appeals, Dated November 23, 1982

STATE OF NEW YORK COURT OF APPEALS
CERTIFICATE DENYING LEAVE

Before: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSE OJEDA,

Defendant-Appellant.

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
November 23, 1982

/s/ JACOB D. FUCHSBERG
Associate Judge

---

* Description of Order: Order of the Appellate Division, First Department dated September 16, 1982, affirming judgment of Supreme Court, New York County, rendered October 18, 1981.

Appendix B—Letter of Richard L. Huffman, Esq., Seeking Leave to Appeal to the New York State Court of Appeals, Dated October 7, 1982.

BADEN KRAMER & HUFFMAN
Attorneys at Law
70 Pine Street
New York, New York 10270

GREGORY ABBEY
WAYNE I. BADEN
WILLIAM M. BRODSKY
RICHARD L. HUFFMAN
DOUGLAS J. KRAMER

TELEPHONE
(212) 363-7020

October 7, 1982

Honorable Lawrence H. Cooke
Chief Judge
Court of Appeals—State of New York
Albany, New York 12207

Attn. Joseph W. Bellacosa
Clerk of the Court

Re: People v. Ojeda, Index No. 710/81
New York County

Dear Justice Cooke:

This is an application made pursuant to Criminal Procedure Law Section 460.20 on behalf of the defendant Jose Ojeda for a certificate granting leave to appeal to the Court of Appeals from an order of the Appellate Division, First Department dated September 16, 1982 affirming a judgment of conviction without opinion. No application for such leave has been made to a Justice of the Appellate Division. Oral argument on this application is requested if it can be accomplished by conference call or in New York County.

Appendix B

Very briefly, the facts which give rise to this appeal are the following: As the defendant was parking a friend's rented car he was stopped by police officers for failure to use the left hand turn signal. A passenger had exited the car a minute or two before the left hand turn. The defendant was arrested, the car was searched by the police and a gun was found under the passenger seat.

A complaint was filed charging defendant with commission of a felony. On motion of the People and after finding there was no reasonable cause to believe a felony had been committed Judge Gartenstein reduced the charge to a misdemeanor. A few days later the People obtained a felony indictment again charging the defendant with criminal possession of a weapon in the third degree. Penal Law § 265.02(4). By pretrial motion the defendant sought to suppress the gun, but his motion was denied by Justice McQuillan in a written opinion. At trial, Judge Hornblass instructed the jury that defendant may be presumed to have intentionally and knowingly possessed the gun. After asking for that charge to be re-read, the jury convicted the defendant. During trial defendant called two witnesses, a high school principal and the vice president of a computer software firm who testified as to his good character. At sentencing defendant submitted letters from his employer, State Assemblyman and a State Senator. Nevertheless, on October 18, 1981 Judgment was entered and defendant was sentenced to a term of imprisonment of forty-five days to be served on weekends. Defendant is released on bail pending determination of his appeal.

The legal issues preserved for appeal are:

1. Was the complete search of the car after appellant was stopped for a traffic violation "reasonable" within the meaning of the Fourth Amendment?

2. Did the Court correctly charge the jury that the defendant could be presumed to intentionally and knowingly possess the gun simply because he was an occupant of the car?

3. Can a defendant constitutionally first be denied "standing" to challenge a search because he lacks a possessory interest in the object searched for, but then be convicted on the basis of a presumption that he knowingly and intentionally possessed the object searched for?

4. Was there sufficient evidence to find the appellant guilty beyond a reasonable doubt of intentionally and knowingly possessing the gun hidden under the passenger seat of the borrowed, rented car?

5. Can the appellant be indicted on a felony gun charge after the felony gun charge in the criminal complaint was reduced to a misdemeanor by a judge upon motion of the prosecutor after a finding there was no reasonable cause to believe that a felony had been committed?

6. Can the prosecutor break his agreement to accept a plea to a Class B misdemeanor and obtain a felony indictment on a result of political pressure from the Mayor?

7. Should the conviction of appellant be reversed in the interest of justice?

Enclosed herewith are the following:

a) Opinion of Justice Peter McQuillan denying appellant's motion to suppress the gun;

b) Appellant's brief submitted to the Appellate Division;

c) Respondent's brief submitted to the Appellate Division; and

d) Order of affirmance of the Appellate Division.

If there is any other information or documents which you may require, please let me know and I will try to supply them.

Very truly yours,

RICHARD L. HUFFMAN
Richard L. Huffman

RLH/dh-a
Enclosures a/s

cc: Hon. Robert Morganthau
District Attorney
New York County

Appendix C—Order of Affirmance On Appeal From Judgment by the Appellate Division, First Department, of the New York Supreme Court, Dated September 16, 1982

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 16, 1982.

Present—Hon. Leonard H. Sandler, Justice Presiding
Max Bloom
Arnold L. Fein
Sidney H. Asch
E. Leo Milonas, Justices.

Order of Affirmance on Appeal from Judgment 14309.

The People of the State of New York,

Respondent,

against

Jose Ojeda,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Hornblass, J., at trial and sentence; McQuillan, J., at suppression hearing) rendered on October 18, 1981, convicting defendant of criminal possession of a weapon in the third degree, and said appeal having been argued by Mr. Richard L. Huffman of counsel for the appellant, and by Mr. Charles E. Knapp of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjuged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Enter:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Appendix D—Opinion, Decision and Order of Justice McQuillan, Supreme Court of the State of New York, Dated May 8, 1981

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 69

Indictment No. 0710/81

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSE OJEDA,

Defendant.

McQUILLAN, J.:

Defendant has been indicted for the crime of criminal possession of a weapon in the third degree as an armed felony. Defendant, claiming to be aggrieved by an unlawful search and seizure, has made a motion for an order suppressing physical evidence (a weapon and the ammunition in that weapon) seized on September 5, 1980. A pre-trial suppression hearing was conducted before me on April 13, 1981. One witness testified at this hearing: Police Officer James Dugan. I gave credence to his testimony.

Although defendant has the ultimate persuasion burden of proving the illegal seizure of physical evidence, the People, nonetheless, have the burden of going forward to show, in the first instance, the legality of the police conduct that resulted in the seizure of the evidence sought to be suppressed.

Appendix D

Findings of Fact

Police Officers James Dugan and William Orenberger were on radio patrol duty in the early morning hours of September 5, 1980. At approximately 5:00 A.M., while driving southbound in their patrol car on St. Nicholas Avenue, they noticed a vehicle with a Wisconsin license plate. The vehicle was at the time double-parked, facing northbound, on St. Nicholas Avenue between 145 and 146 Streets. Officer Dugan noticed two figures seated in the front seat of the vehicle.

The officers proceeded southbound on St. Nicholas Avenue past the vehicle with a Wisconsin license plate, and made a U turn just prior to the intersection of St. Nicholas Avenue and 145 Street. As they completed the U turn they saw the double-parked vehicle pull away from the curb and proceed to the intersection of St. Nicholas Avenue and 147 Street, where the driver of the vehicle (defendant) made a left turn onto 147 Street without signalling. At this point Officer Dugan noticed that there was only one person (defendant) in the vehicle.

The defendant drove this vehicle approximately half a block west on 147 Street and parked it in front of a fire hydrant. The officers double-parked their vehicle behind the defendant's. The defendant had already exited the vehicle with a Wisconsin plate when the officers exited their patrol car. Officer Dugan proceeded to the driver's side of the vehicle which defendant had been driving and requested a license and registration for the vehicle. Officer Orenberger was by this time positioned on the passenger side of the vehicle, standing on the sidewalk.

The defendant informed Dugan that he did not have a driver's license. Defendant did produce a Citibank card to identify himself to the officers. He informed Dugan that a named friend, who owned the vehicle, had asked him

(defendant) to park it. Defendant first stated that he did not know where the vehicle's registration was, and then produced a rental agreement from the automobile's glove compartment. This rental agreement was between National Car Rental Systems and Carl Carter. Carl Carter was not the name of the friend defendant had only seconds earlier stated to be the vehicle's owner. There was an additional name on the rental agreement, William Scott, also not the name of the friend defendant had given the officers. The license number of the vehicle matched the license number on the rental agreement.

Dugan radioed police headquarters for a stolen car check on the vehicle. This check produced no confirmation that the vehicle had been stolen. At this point Officer Orenberger took the vehicle's keys from the defendant and proceeded to open the passenger side door. Dugan remained with the defendant, outside the vehicle, on the driver's side. Orenberger began to search the vehicle and almost immediately discovered a Luger revolver under the front passenger seat. When Dugan was informed by Orenberger of the discovery of the weapon he frisked the defendant, handcuffed him, and radioed for a backup patrol car. One of the backup officers drove the National Car Rental vehicle to the station house. Dugan and Orenberger returned to the station house with the defendant.

At approximately 7:45 A.M. Dugan spoke with an official of National Car Rental, who stated that defendant was not authorized to drive the rented vehicle. Later the same day, Dugan spoke to another official of National Car Rental. This second official informed Dugan that the vehicle defendant had been driving was a stolen vehicle. Dugan vouchered the vehicle, a standard police procedure which involves an inventory search of the interior of the car.

Appendix D

CONCLUSIONS OF LAW

In deciding whether or not a particular search or seizure is reasonable, I "must consider . . . whether or not the police action was justified in its inception and . . . whether or not that action was reasonably related in scope to the circumstances which rendered its initiation permissible." People v. DeBour, 20 NY2d 210, 215 (1976), *quoting* People v. Cantor, 36 NY2d 106, 111 (1975). I find, under the circumstances here, that the police action was reasonable both in its inception and scope.

The police may stop a motor vehicle on a public street when, *inter alia*, there is a reasonable suspicion that its occupants have been engaged in conduct in violation of law. People v. Sabotker, 43 NY2d 559 (1978). Here the officers had observed the defendant make a left hand turn without signalling, in violation of the Vehicle and Traffic Law. They were therefore justified in approaching defendant and requesting from him a copy of his driver's license and registration. *See, e.g.*, People v. Singleton, 41 NY2d 402 (1977).

Once the defendant failed to produce a driver's license or registration, and instead produced a rental agreement in the name of an individual which differed from that of the person he had only seconds earlier stated to be the vehicle's owner, it was not unreasonable for Officer Orenberger to ask the defendant for the keys to the vehicle. Nor was it unreasonable for the officer to search the vehicle.

At the time of the search the officers had probable cause to believe both that the vehicle had been stolen and that a search of the vehicle might produce evidence of its theft.

Assuming that the officers did not have probable cause to believe that the vehicle had been stolen, it was still

reasonable for the officers to have searched the vehicle in an effort to determine ownership. The defendant, given an opportunity to produce proof of registration, had not done so. Instead, he produced a rental agreement in the names of two unknown and unidentified individuals. Defendant's only explanation of ownership right was a statement that he had been asked to park the car for a named but possibly fictitious friend. The officers were not required to accept this explanation, because defendant's statements cast serious doubt on his veracity. The officers could, under these circumstances, reasonably look for registration papers in the car's interior. The fact that Officer Orenberger discovered a gun and not registration papers does not make the search unconstitutional under Fourth Amendment principles.

Even were I to conclude, which I do not, that Officer Orenberger acted unreasonably in searching the vehicle, the evidence seized would be admissible under the "eventual discovery" or "inevitable discovery" doctrine. This doctrine allows the People to prevent suppression by proving that the evidence would have been discovered through legitimate means in the absence of official misconduct. Put somewhat differently, the doctrine allows the People to remove the "taint" from the "fruits" by establishing that the improper official conduct was not a *sine qua non* of the discovery of the evidence. *People* v. *Fitzpatrick*, 32 NY2d 499, *cert den*, 414 U.S. 1033 (1973).

Here Officer Dugan would certainly have retained possession of the vehicle and conducted an inventory of its interior until he could ascertain proper ownership. To have done otherwise would have constituted dereliction of duty and violation of standard police procedure.

While it is usually difficult to hypothesize what the police response will eventually be to a given situation, because "it is extremely rare to find a normal, lawful

police procedure which is regularly followed and inevitably would have produced the same exact information" or result, Pitler, "The Fruit of the Poisonous Tree Revisited and Shepardized," 56 Cal. L. Rev. 579, 629 (1968), the inventory procedure of an impounded vehicle is a routine police procedure with predictable results. I can be practically certain that this procedure would have resulted in a lawful seizure of the weapon and ammunition.

Defendant's motion to suppress the weapon and ammunition is therefore denied in all respects.

The aforesaid constitutes the opinion, decision and order of the court.

Dated: May 8, 1981

/s/

PETER J. MCQUILLAN
Justice, N. Y.

Appendix E—Excerpts From Transcript of Trial Before Hon. Jerome Hornblass, Justice of the Supreme Court of the State of New York, Dated August 5-6, 1981

Trial Transcript at p. 101

• • • •

Mr. Huffman: Judge, I think it might help if I spoke about it momentarily.

I did a little bit of research last evening and I can give your Honor the cases that I found and the analysis that I found. Obviously, the leading case on the subject is County Court of Ulster County versus Allen, which is the Supreme Court case of two years ago which is 99 Supreme Court 2213.

The Ulster County case, while it upheld the giving of this charge, upheld it in a very narrow way. The opinion—the decision was a five to four decision. There wasn't even a majority opinion. There were four justices who concurred in one opinion and there was a separate concurrence, and in the opinion written by the—concurred in by four of the justices, it was a very narrow opinion and it said in essence that only if the facts of the case warranted it could this charge be given. That is, only if there was some sort of rational or reasonable basis for giving the charge should it be given, and if it was given it had to be [102] given in the context of an extremely strong discussion of mandatory presumption of innocence in favor of the defendant. That's found at Page 227 of the Supreme Court's opinion.

I think closer to the facts of this case, though, are two cases that were before judges of the Supreme Court of the State of New York in New York County. One of them is People versus Joseph, which is at 422 New York Sup. Second 751, and the other of which is People versus Alston,

which is 404 New York Sup. Second 277. Both of those cases were decided in 1978. The opinion on one of them was written—on Joseph was written by Administrative Judge Leo Milonis. The decisions in both cases were after the Second Circuit decision which found this presumption unconstitutional but prior to the Supreme Court decision upholding the presumption.

I think the thrust of both judges' reasoning in both the Alston and Joseph case was where you only have an occupant of a car in the car and the gun in the car, that is not sufficient to give this charge, that it's not rational and there's no reasonable way that a reasonable person could come to the conclusion that the occupant of the car had knowing possession of that gun. [103] There has to be something more than just that bare bones fact pattern. Either the occupant of the car has to reach for the gun, the occupant of the car has to be seen to put something into the car, the occupant of the car has to perhaps have a purse and the gun be sticking out of the purse of maybe just with a woman. Some sort of fact pattern like that.

Perhaps the gun is in the jacket of the occupant of the car. There is something else other than the mere presence that is required before this presumption can be given. I think that it would be improper to give any kind of charge with respect to presumption to this jury.

The Court: You want to withdraw this request?

Mr. Huffman: My first point is that no charge should be given to the jury on presumption whatsoever. If your Honor for some reason finds against the defendant on that point, then I think that this charge should be given to the jury without the word "knowing" in it, because, as I read the statute on presumption, the statute says that you can presume possession. It does not say anything about you may presume knowledge. In the absence of the word "knowledge" in the presumption, I don't think that it can be charged to the jury.

[104] The Court: The whole idea of presumption is to speak of knowing.

Mr. Huffman: It also has to do with possession. There is a distinction betwen the two. Nothing in the presumption says anything about knowing. It just says possession. If you are giving them the charge, it should be limited to the statutory language. It doesn't say anything about knowing.

• • • •

Trial Transcript at p. 108

• • • •

The Court: Yesterday before we left, Mr. Huffman, you made two requests. Do you still make those same requests?

Mr. Huffman: Yes. One is that there would be no charge at all with respect to presumption and second is that if your Honor rules against me with respect to that, then the charge without the word "knowing" added should be given.

The Court: Just so we could understand your thinking, tell me why you do not want the presumption charge.

Mr. Huffman: It's the Defendant's position that the People have failed to produce evidence which would be sufficient to enable a reasonable person to logically conclude that the defendant had knowing [109] possession of the gun.

And in the absence of any evidence that would tend to show that, it's improper for the jury to be instructed that they can presume that he knew it.

• • • •

The Court's Charge to the Jury at p. 158
Trial Transcript

According to the law, to possess means to have physical possession or otherwise exercise dominion or control over tangible property. Possession of property must be knowing possession, that is, the alleged possessor must be aware of his possession of the property.

Now, it has been referred by the lawyers, that there is a presumption. Now, there is a special presumption enacted again by our Legislature having to do with situations where this kind of an object is found in an automobile, and it's also a section of the law, and that section of the law is called 265.15 Subdivision 3, and the headline of that section is special presumption having to deal with criminal possession of a weapon. Now pay close attention.

The fact of knowing possession—well, you know what I will do? I want you to keep that in the back of your mind and I will get to presumption. I want to go to the other elements of the crime first then I will get to that.

We have spoken about Element No. 1, that there has to be a tangible—a certain object.

Number two, the second element, that the defendant possessed the—what the defendant possessed—this [159] object was in fact a firearm.

According to the law, a firearm is any pistol, revolver, sawed-off shotgun or other firearm of the size which may be concealed upon the person, except an antique firearm.

3. That the firearm was loaded at the time the defendant possessed it.

According to the law a loaded firearm is any firearm loaded with ammunition.

That's the third element.

The fourth element is that the defendant knowingly possessed the loaded firearm. According to the law, a person knowingly possesses a loaded firearm when he is aware that he possesses that loaded firearm.

And five is that the defendant's possession of the loaded firearm did not take place in his home or his place of business.

Now I want to get back to the presumption. You remember when I spoke about the elements I said that the first element is that you have to find that on September 5, 1980, in New York, the defendant possessed a certain object.

That object is a firearm, and that firearm is a loaded firearm, and that loaded firearm [160] has to be knowingly possessed and that firearm cannot be in a place of business or in a home. And I said that there's a special presumption enacted by the Legislature, and here it is. I'm not going to read the section, I will explain it to you now. So I am not quoting the section, but I am explaining to you what the section is.

The fact of knowing possession of a loaded firearm on the part of any person occupying an automobile at the time that such firearm is found therein is often the secret operation of such person's mind. Therefore, the law permits—and I emphasize, the law permits, but does not require, the jury to presume or infer knowing possession in some circumstances.

According to the law, the presence of a loaded firearm in an automobile other than a stolen one or a public omnibus is presumptive evidence of possession of the firearm by any persons occupying such automobile at the time such firearm was found.

This means that after considering all of the evidence in the case, you may presume or infer from the presence of the firearm in the automobile—by the way, if you find that it is a firearm, again, if you find, and I've been over that again, that the [161] firearm was possessed by any persons occupying such automobile at the time such firearm was found, or you may reject such presumption. However, the fact that you may infer such possession does not shift to the defendant any burden of proof whatsoever. The burden of proof remains on the prosecution throughout the case. Before you may return a verdict of guilty, each of you, after careful consideration of all of the evidence in the case, must be satisfied that the prosecution has proved beyond a reasonable doubt each and every element of the crime of possession of a weapon.

• • • •

Appendix E

At Conclusion of Court's Charge, p. 165 Trial Transcript

Mr. Huffman: I just want to preserve the exceptions and motions I made earlier.

• • • •

Court's Response to Jury's Question Regarding Inference, p. 174 Trial Transcript

• • • •

The Court: Madam Forelady, we have your question at 2:10. It says, "could you review with the jury the section of the law that you interpreted about inference—we believe that you said that if a person is in a car which is not a public omnibus or a stolen car and the gun is present, we may conclude that the person had possession of the gun."

[175] First I appreciate the fact that you have very good handwriting. Your grammar—

The Foreperson: Two people wrote that.

The Court: I'm going to say a couple of things to you.

First, as jurors you have it within your power to draw proper, reasonable and just inferences from the testimony and the exhibits in evidence and to determine the probabilities arising from the case after carefully analyzing, weighing and considering the testimony of each witness who has testified at this trial and all exhibits in the case.

The defendant is entitled—I am repeating what I said to you before, it is nothing new. I said it before and I will repeat it, because I think it answers your question.

The defendant is entitled to every inference in his favor which can reasonably be drawn from the evidence, and where two inferences may be drawn from the evidence, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference of innocence.

Now, I told you too that in addition to the—not in addition but there are five elements attached [176] to this crime of Criminal Possession of a Weapon in the third degree, and I also said that there is a special presumption which can be—which may be applied to this situation. I'm going to repeat what I said to you.

The fact of knowing possession of a weapon on the part of all persons or any persons occupying an automobile at the time when this weapon was found is often the secret operation of such person's mind. Therefore, the law permits but does not require the jury to presume or infer knowing possession in some circumstances.

According to the law, the presence of a revolver in an automobile other than a stolen one or a public omnibus is presumptive evidence of possession of the revolver by any person occupying such automobile at the time such revolver was found. This means that after consideration of all of the evidence in the case, you may presume or infer from the presence of the revolver in the automobile that the revolver was possessed by any person occupying such automobile at the time such revolver was found. Or you may reject such presumption.

However, the fact that you may infer such [177] possession does not shift to the defendant any burden of proof whatsoever. The burden of proof remains with the prosecution throughout the case. Before you may return a verdict of guilty, each of you, after careful consideration of all the evidence in the case, must be satisfied that the prosecution has proved beyond a reasonable doubt each and every element of the crime of possession of a weapon.

I'm going to repeat again the first two paragraphs regarding the presumption.

The fact of knowing possession of a weapon on the part of all persons occupying an automobile at the time such weapon is found therein is often the secret operation of

such person's mind. Therefore, the law permits but does not require the jury to presume or infer knowing possession in some circumstances.

According to the law, the presence of a revolver in an automobile other than a stolen one or a public omnibus is presumptive evidence of possession of the revolver by all persons occupying such automobile at the time such revolver was found.

• • • •

[179]

(At 3:05 p.m. the jury retired to continue their deliberations.)

Mr. Huffman: I object to the reading of that portion of the charge that your Honor read twice. I thought it unduly emphasized a part of the charge which was weighted towards the prosecution. I think proper balance would have required that you also read part of the charge with respect to reasonable doubt and what not.

• • • •

Appendix F—Stipulation Waiving Inclusion of Sentencing Minutes in Record on Appeal, Dated January 21, 1982

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

Indictment No. 0710/81

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOSE OJEDA,

Defendant-Appellant.

It is hereby stipulated and agreed by and between the attorneys for both sides that:

1. The defendant was sentenced by the Honorable Jerome Hornblass on October 19, 1981 to a term of 5 years probation, with a period of incarceration of forty-five (45) days to be served on weekends.

2. Execution of the sentence was stayed pending the determination of this appeal.

3. The minutes of the sentencing are unnecessary to the prosecution of this appeal and their inclusion in the record

is hereby waived. No excessive sentence argument will be raised by Appellant.

Dated: New York, New York
January 21, 1982

Richard L. Huffman
Baden Kramer & Huffman
Attorneys for Defendant-Appellant
70 Pine Street
New York, New York 10270
(212) 363-7020

Bruce Allen
Bruce Allen
Assistant District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013